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No. 368 8

In the Supreme Court of the United States

OCTOBER TERM, 1928

FEDERAL TRADE COMMISSION, PETITIONER

v.

ALFRED KLESNER, DOING BUSINESS UNDER THE NAME "SHADE SHOP," HOOPER & KLESNER, RESPONDENT

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

U.S. GOVERNMENT PRINTING OFFICE: 1928

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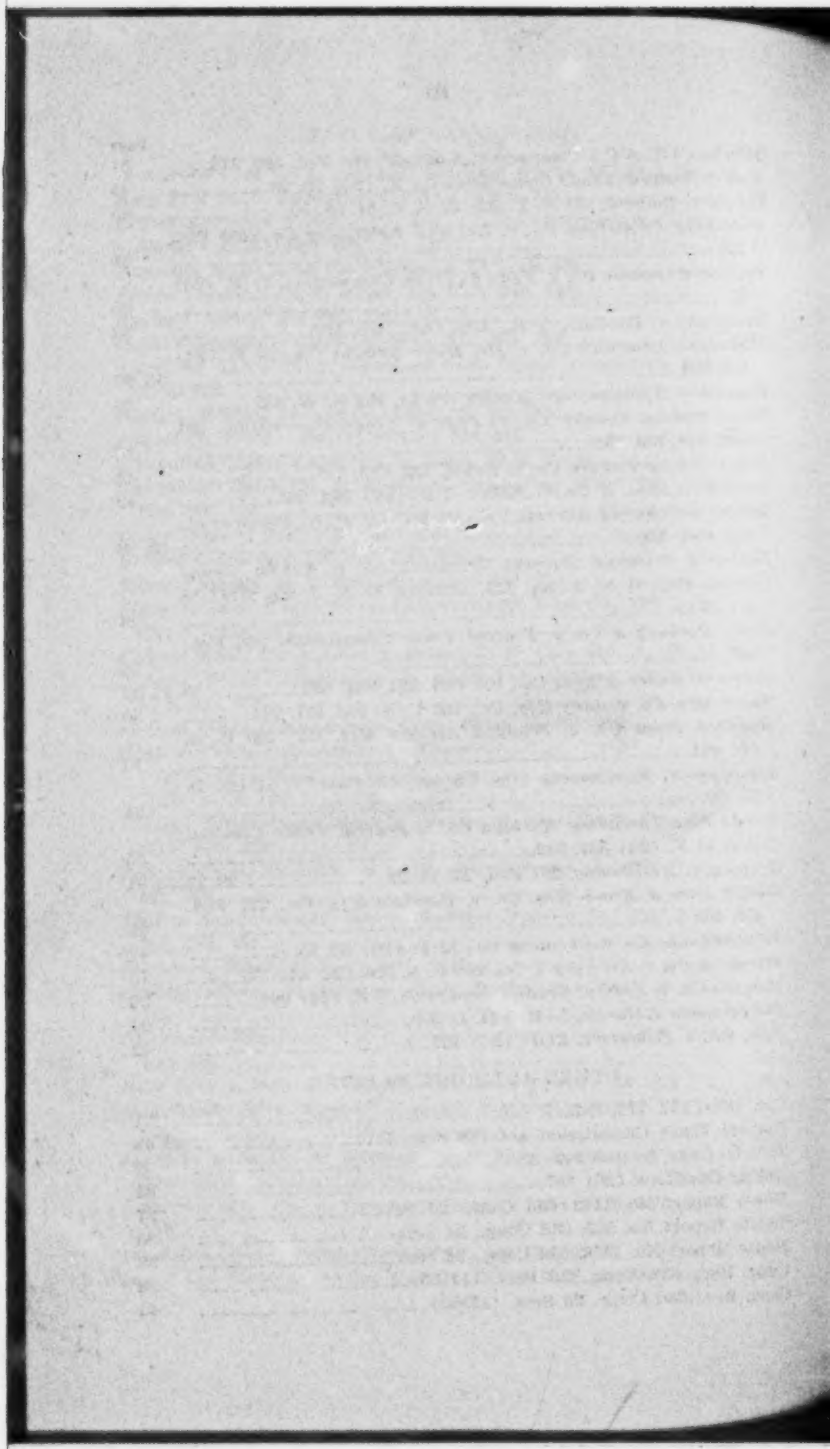

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 363

FEDERAL TRADE COMMISSION, PETITIONER

v.

ALFRED KLESNER, DOING BUSINESS UNDER THE NAME "Shade Shop," Hooper & Klesner

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OPINION BELOW

The opinion of the Court of Appeals of the District (R. 453) is reported in 25 F. (2d) 524.

JURISDICTION

The judgment of the Court of Appeals was entered April 2, 1928. (R. 457.) On June 22, 1928, a Justice of this Court extended the time for filing a petition for certiorari to and including August 15, 1928. (R., Vol. II, p. 14.) Petition for certiorari was filed August 15, 1928, and was granted October 22, 1928. (R. 458.) The proceeding was instituted in the Court of Appeals of the District by the Federal Trade Commission to enforce an order of the

Commission. The jurisdiction of this Court rests on section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717; U. S. C. title 15, section 45), and on section 240 of the Judicial Code as amended by the Act of February 13, 1925 (*Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Klesner*, 274 U. S. 145.)

THE QUESTIONS PRESENTED

One Sammons had long been selling window shades in the District under the trade name of "The Shade Shop." The Federal Trade Commission, on a hearing pursuant to section 5 of the Federal Trade Commission Act, found that the respondent Klesner was using the name "Shade Shop" in connection with his own name for the purpose of deceiving the public and gaining the business built up by Sammons, and found this to be unfair competition and ordered Klesner to desist from using the term "Shade Shop." In proceedings instituted by the Commission in the Court of Appeals the court refused to enforce obedience to this order.

The principal questions in the case are whether there was substantial evidence to support the Commission's findings that the respondent was guilty of unfair competition, and was using the name "Shade Shop" to deceive Sammons' customers, and whether the name "The Shade Shop" is merely a descriptive term which may be used by the respondent or anyone else, regardless of intent or effect on Sammons' business, or whether the name

had acquired a secondary meaning in this case as denoting a particular establishment. The question also occurs whether there is sufficient public interest in a case of this type to warrant action by the Commission under the terms of the Federal Trade Commission Act.

THE STATUTES

Section 5 of the Federal Trade Commision Act is in the appendix hereto (p. 48).

STATEMENT

This is a proceeding instituted by the Federal Trade Commission in the Court of Appeals of the District of Columbia (R. 417) to enforce obedience to an order of the Commission (R. 416) directing the respondent to desist from using the words "Shade Shop" alone or in conjunction with other words as an identification of the business conducted by him. The Court of Appeals in June, 1925 (R. 451) dismissed the proceeding for want of jurisdiction, on the ground that the Court of Appeals of the District was not a Circuit Court of Appeals authorized to entertain such proceedings, within the meaning of the Federal Trade Commission Act. On certiorari this court held that the Court of Appeals had jurisdiction and reversed its judgment. (*Federal Trade Commission* v. *Klesner,* 274 U. S. 145.)

In December, 1920, the Commission, on complaint of one W. Stokes Sammons, charged this respondent with unfair methods of competition in com-

merce. After a hearing the Commission made findings. (R. 411–416.) It found that Sammons is a resident of the District and has been engaged exclusively since 1901 in manufacturing and selling window shades throughout the District and in near-by States under the trade name of "The Shade Shop," adopted by him in 1901, and since continuously used, and has been the only person in the District dealing in window shades under that name until the respondent, Klesner, adopted the name "Shade Shop, Hooper & Klesner," that because of this and the course of business, and by advertisements and long usage, "The Shade Shop" has come to mean to the public the shade business owned and operated by Sammons. (R. 413.) In May, 1914, the respondent, with his then partner, one Hooper, holding a leasehold in a store at the southeast corner of Twelfth and H Streets NW., sublet (R. 390) to Sammons one-half of the space for a period of two years, to conduct therein "The Shade Shop." Hooper & Klesner were engaged in wallpapering and interior decorating, and had never been in the business of dealing in window shades, except to receive occasional orders which they turned over to Sammons or some other shade dealer and on which they received a commission.

In November, 1915, Sammons leased the store at 733 Twelfth Street NW. and moved his business thereto. When making the move and removing the sign "The Shade Shop" from the premises leased

from Klesner, the latter made trouble threatening Sammons with violence and was arrested.

The findings are to the effect that Klesner was thus angered and undertook to conduct a window-shade business in the premises he had formerly sublet to Sammons, and deliberately undertook to get Sammons' business from him, leading Sammons' customers to think that Sammons' business was still being conducted at Twelfth and H Streets NW. With that purpose, the sign "Shade Shop" was placed upon the windows of Sammons' old quarters, in the same size, style, and color of lettering as had been used in the sign "The Shade Shop" theretofore used by Sammons, and on letterheads, in telephone directory, and in other ways used the term "Shade Shop, Hooper & Klesner." The findings also show that customers of Sammons were deceived by the respondent and his employees when they entered the store formerly occupied by Sammons, and led to believe that they were in the shade shop of Sammons. The Commission held that this was unfair competition and issued its order to desist from using the name "Shade Shop."

The Circuit Court of Appeals held that the name "The Shade Shop" was a generic name descriptive of the trade or business conducted by the respondent, and that under no circumstances could Sammons acquire any exclusive right to it. It also said (R. 455):

> There is a total absence of anything showing a use by defendant which would justify the charge of unfair competition, but on the contrary a use ordinarily employed by those engaged in his line of business.

It said (p. 456):

> The record is silent as to any attempt on the part of defendant or his employees to deceive or entice Sammons' customers into dealing with him.

These statements, which are not supported by the record, may be explained by another statement of the court below (p. 454):

> Considerable evidence was adduced showing the competitive character of the business between defendant and Sammons, and establishing some confusion in trade by customers going to defendant's shop when they were in fact intending to do business with Sammons. We think, however, that the case can be disposed of without an analysis of the testimony, since it clearly appears and is conceded that the use was limited, as charged in the complaint, to a sign or signs painted on his place of business, on an automobile used in connection with his business, and to a notice appearing in the classified business section of the telephone directory of the city of Washington. In each instance the name was used in connection with the firm name Hooper & Klesner.

The court below disposed of the case on the ground that it was immaterial whether there was any intent to deceive the public, or by deception to gain Sammons' trade, and that the term "Shade Shop" could be used by any one regardless of circumstances or intent.

Section 5 of the Federal Trade Commission Act provides that "the findings of the Commission as to the facts, if supported by testimony, shall be conclusive."

Because of this misapprehension by the court below and the statements in its opinion, it is necessary here to present an analysis of the testimony before the Commission to show that there was evidence to support its findings. We have placed this analysis of the evidence in the appendix hereto, at page 51. An examination of it is necessary to a full understanding of this case, and it is placed in the appendix, not because it is unimportant but to avoid confusion as to the arrangement of this brief. It discloses convincing evidence that the adoption of the term "Shade Shop" by the respondent was not a bona fide effort to describe his business, but was part of a deliberate plan to deceive the public, to deceive Sammons' customers, to gain away from Sammons the trade he had built up under the name "The Shade Shop," and that the respondent was doing his utmost to make the public believe that Sammons was still conducting "The Shade Shop" at his former location now occupied by the respond-

ent. The record contains convincing proof that this effort was in considerable measure successful, and that customers of Sammons were being deceived, and those who desired to trade with him were misled, and that these unfair and deceptive methods operated to Sammons' detriment in competition.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred—

1. In holding that there was no evidence to support the Commission's finding that the public was being deceived by the use of the trade name "Shade Shop" by respondents.

2. In failing to give effect to the Commission's finding of intention on the part of respondents to appropriate the business of a competitor by deceiving the public when such finding is supported by evidence.

3. In not holding that the acts practiced by the respondents in this cause constituted unfair methods of competition within the meaning of section 5 of the Federal Trade Commission Act, and warranted the issuance of the Commission's order to cease and desist.

4. In holding that the trade name "The Shade Shop" was a purely generic or descriptive term as applied to window shades.

5. In not holding that when a trade name for an establishment, though it is descriptive in its primary signification, has acquired a secondary mean-

ing, a competitor will be restrained from using it, though he may use the words of which it is constituted descriptively.

6. In holding that respondent sufficiently distinguished his establishment by the use in some relations of the firm name.

7. In not giving effect to the applicable decisions of this Court under the Federal Trade Commission Act.

SUMMARY OF THE ARGUMENT

1. The practice prohibited by the Commission's order is an unfair method of competition within the meaning of section 5 of the Trade Commission Act. The Act declares unlawful methods characterized by deception, bad faith, fraud, or oppression. The intentional passing off of one's establishment or goods as those of another has frequently been declared by this court to be a fraud on the public and on the competitor.

2. The trade name "The Shade Shop" is not purely a descriptive term as applied to a store which deals in window shades. It does not advise the prospective purchaser what sort of shades may be had therein.

3. Even though the name be descriptive in its primary signification, it had, in this instance, acquired a secondary meaning as denoting a particular establishment. The respondent will, therefore, not be allowed to adopt the same or practically the same trade name with the intention of deceiving the pub-

lic and appropriating the trade of the senior company. Respondent may use the words descriptively but not as a trade name. Use as a trade name is not a descriptive use. Respondent should be enjoined from using the trade name "Shade Shop."

4. If respondent may use the trade name "Shade Shop" he must plainly and unmistakably distinguish his establishment from "The Shade Shop." In advertising respondent distinguished only by using the firm name "Hooper & Klesner" in type smaller than the name "Shade Shop." In the listing in the telephone book no distinction was made, the names appearing "Shade Shop," and "Shade Shop." (R. 369.) The use of a firm or company name has frequently been held not sufficiently to distinguish the junior from the senior business. The proof of deception and passing off demonstrates that respondent failed adequately to distinguish his business. He should be required affirmatively and positively to distinguish it.

5. The case at bar falls within a class of which the Commission has jurisdiction. This is expressly held by two circuit courts of appeals. The history of the legislation demonstrates that Congress intended to include such cases within the prohibition of the Act. These cases embrace every element found in *Federal Trade Commission* v. *Winsted Hosiery Co.* (258 U. S. 483) and numerous cases under the Act decided by the several circuit courts of appeals. One of the bases of relief in

these cases under equity jurisprudence is the protection of the public.

6. The question whether a proceeding by the Commission would be to the interest of the public is a preliminary administrative question which the statute commits to the Commission for final decision. The Act provides that if "it shall appear *to the Commission* that a proceeding by it would be to the interest of the public," it shall issue its complaint, etc. An order to cease and desist from the use of a method unfair within the meaning of the Act may not be set aside because the court may disagree with the Commission respecting the advisability of instituting the proceeding.

7. A proceeding by the Commission in this case was to the interest of the public of the District of Columbia. Respondent and "The Shade Shop" are both substantial companies with rapidly growing businesses. The Act expressly applies to commerce within the District of Columbia. When inserting this provision Congress acted in its capacity of a local legislature. The business of each of the companies involved, viewed as local business in window shades, is very substantial and the companies doubtless reach some thousands of persons in Washington. It is not necessary in a proceeding under this provision in the Act to show that widespread public interest which attaches to a proceeding involving commerce national in its character.

ARGUMENT

I

The term "unfair methods of competition," as used in the Federal Trade Commission Act, includes practices opposed to good morals because characterized by deception and fraud

This court, in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427, said:

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as *opposed to good morals because characterized by deception, bad faith, fraud* or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. (Italics supplied.)

This same definition is referred to with approval in *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441, 453; *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U. S. 483, 493, 494; *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U. S. 463, 475; and *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 572.

II

The practices pursued by respondents in this case have always been regarded as opposed to good morals, because characterized by deception and fraud

In deliberately adopting the trade-name "Shade Shop," in almost exact simulation of the trade-name "The Shade Shop," long previously adopted and ever since continuously used by Sammons, and with the expressed intention of securing the benefit of the good will built up by Sammons, respondents have committed themselves to a course of conduct which has been condemned by the courts from the beginning, as a fraud upon the public and upon the competitor.

In the leading case of *Canal Company* v. *Clark* (13 Wall. 311), relied upon extensively by the Court below, where the terms "trade-mark" and "trade-name" are used interchangeably, this Court, referring with approval to the case of *Brooklyn White Lead Company* v. *Masury* (25 Barb. 416), where injunction was granted, said:

> It was a case of fraud. He had assumed a false name in imitation of a prior true one, *and with the obvious design of leading the public to think his manufacture was that of the plaintiff* (p. 325). (Italics supplied.)

Again (p. 327):

> It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to *a false representation, express*

> *or implied, designed or incidental,* that there is any title to relief against it. (Italics supplied.)

In *Lawrence Manufacturing Company* v. *Tennessee Manufacturing Company,* 138 U. S. 537, 549, 551, this Court, by Mr. Chief Justice Fuller, said:

> It seems, however, to be contended that plaintiff was entitled at least to an injunction, upon the principles applicable to cases analogous to trade-marks, that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. *Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief (p. 549).* (Italics supplied.)
>
> * * * * *
>
> But the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances (p. 551).

In *Howe Scale Company* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 140, the same eminent jurist epitomized the doctrine of unfair competition:

> The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another.

Mr. Justice Sutherland, in the recent case of *Warner & Company* v. *Eli Lilly & Company*, 265 U. S. 526, 531–532, said:

> The manufacturer or vendor is entitled to the reputation which his goods have acquired and the public to the means of distinguishing between them and other goods; and protection is accorded against unfair dealing whether there be a technical trade-mark or not. The wrong is in the sale of the goods of one manufacturer or vendor as those of another. * * * The use dissociated from the fraud is entirely lawful, and it is against the fraud that the injunction lies.

See also *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 566; *Standard Paint Co.* v. *Trinidad Asphalt Manufacturing Co.*, 220 U. S. 446, 461; *Richmond Remedies Co.* v. *Dr. Miles Medical Co.*, 16 F. (2d) 598 (CCA–8).

And even though the widest latitude is allowed in the use of one's own name, such use will be enjoined when the object is fraud. Thus, in *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 542:

> * * * Cases are not wanting of injunctions issued to restrain the use even of one's own name where a fraud upon another is manifestly intended * * * (citing a number of cases).

III

The trade name "The Shade Shop" is not a purely descriptive term, as applied to window shades

The Court below relies on the well-established principle, as enunciated in *Canal Co.* v. *Clark* (*supra*), namely, that a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, can not be employed as a trade-mark and the exclusive use of it protected; and places the trade name "The Shade Shop" in the same category as "barber shop," "candy shop," "hardware store," and "jewelry store". (R. 455.)

While it is true that the term "The Shade Shop," as used by Sammons, might to a certain extent be considered a descriptive term, and to indicate that "shades" of some or all kinds might be purchased at his establishment, yet it is by no means as descriptive of the character of his business as the terms "barber shop," "candy shop," "hardware store," and "jewelry store" are indicative of the businesses carried on at such establishments. These are terms which have been in common use for years to designate a class of business establishments and are as exactly applicable to all of a class. On the other hand, the idea of naming a place of business where window shades were manufactured and sold "The Shade Shop" must have been novel. The evidence shows that so far as the manufacturers of window shades were advised this was the only store dealing in these goods which its owners styled "The

Shade Shop" or "Shade Shop." No such expression was in common use prior to its adoption by Sammons.

Furthermore, the name "The Shade Shop" is not sufficiently descriptive to be informative. The word "shade" is applied to articles used for entirely different purposes. There are window shades, lamp shades, sunshades, porch shades, eye shades, and possibly other kinds of shades. "The Shade Shop" may therefore deal in any one of these articles. The name must be supplemented by further information to be informative.

Sammons, when asked why he used the words "window shades" in connection with his trade name "The Shade Shop," replied that this was done *to describe the article he manufactured and sold*, and that the two names conveyed different mea ngs to the public. (R. 197.) "Mr. Wardman could put 'The Shade Shop' on his place down there. He sells *lamp* shades. * * * That is the reason I put 'window shades' next to mine." (R. 198.) In this connection, see also R. 162–163, 219–222.

IV

Though the trade name "The Shade Shop" be descriptive in its primary signification, if it has acquired a secondary meaning a competitor will not be permitted to adopt the same name for the purpose of deceiving and defrauding purchasers

But even though the trade designation of a business establishment or of a product or commodity is composed of geographical or descriptive terms, a

court of equity will enjoin a trade rival from adopting the same or a substantially similar name for his business establishment or for his product where it is proven that the trade designation or name has come to mean to the public the place of business or the product of a particular manufacturer or trader. It is in this that the law of unfair competition differs from the law of technical trade-marks.

The exact question presented here seems not to have been passed upon by this Court. The principle has been announced that where a geographical or descriptive name has acquired a secondary meaning, its use in that sense will be protected by restraining the use by others in such a way as to amount to a fraud on the public. *Canal Co.* v. *Clark, supra; Elgin National Watch Co.* v. *Illinois Watch Case Co.,* 179 U. S. 665, 673, 674, 677; *French Republic* v. *Saratoga Vichy Spring Co.,* 191 U. S. 427, 435.) But it appears not to have been necessary, in the cases reaching this court, to prescribe the nature and extent of the protection which will be afforded.

But the courts of appeals have been called upon not only to lay down the principle but to define the use of such trade names which will be permitted.

The principle was thus stated by Judge Lurton in *Computing Scale Co.* v. *Standard Computing Scale Co.* (118 Fed. 965–967):

> If the complainant has a technical trade-mark in the word "computing," its use by others will be restrained, for a wrongful in-

> tent in so using it will be presumed. But when the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another. (*Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997; *Chemical Co.* v. *Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Mill Co.* v. *Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Elgin Nat. Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Bennett* v. *McKinley*, 13 C. C. A. 25, 65 Fed. 505.)

In the leading case of *Shaver* v. *Heller & Merz* Co. (108 Fed. 821, 831, 832) the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, after an exhaustive examination of the authorities, summarized the law as follows:

> From the opinions which have now been reviewed and the authorities cited below the following principles may be safely deduced:
>
> 1. The sale of the goods of one manufacturer or vendor as those of another is unfair competition, and constitutes a fraud which a

court of equity may lawfully prevent by injunction. (*Manufacturing Co.* v. *Spear*, 2 Sandf. 599; *Seixo* v. *Provezende*, 1 Ch. App. 192, 194; *Coats* v. *Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847.)

2. Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles can not be monopolized as trade-marks. * * *

3. But the use of such geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully enjoined by a court of equity to the same extent as the use of any other terms or symbols. * * *

4. A proprietary interest in the terms or symbols used to palm off the goods of one manufacturer or vendor as those of another, or to commit any other fraud, is not essential to the maintenance of a suit to enjoin the perpetration of the wrong; but an interest in the good will of the business or in the other property threatened is sufficient. * * *

This statement of principles was quoted and expressly reaffirmed by that court in *Buzby* v. *Davis* (150 Fed. 275).

The Sixth Circuit in a recent opinion by Judge King (*Trappey* v. *McIlhenny Co.*, 281 Fed. 23, 25) announces the same doctrine with respect to the protection afforded trade names of establishments or goods though geographical or descriptive terms be used, and quoted with approval the following:

> * * * the rule is, that a subsequent trader may not use even common terms or symbols, his own name, or a geographical or descriptive word, in such a manner as to cause his goods to be known in the market by the same name as that by which a prior trader's similar goods are already known and called for by the purchasing public. The trade name for the goods of a particular trader may not be used by another as the trade name for his similar rival goods. The subsequent trader, however, may use such terms descriptively, to tell the truth about his goods, describing them, stating where and by whom they were manufactured and other like matters, because such terms are publici juris in their primary sense, and can not be exclusively appropriated by any one. But use as a name or title is not a permissible use, because by reason of the acquired secondary meaning such a use carries with it a false representation that the goods of that name are those of the prior trader. (38 Cyc. 722, 771, 772.)

The opinions above cited are replete with authorities supporting the conclusions reached.

The facts in some of the cases will now be examined briefly to demonstrate the exact limits to which the courts go to protect trade names of establishments or of goods which are geographical or descriptive and therefore not the subject of exclusive appropriation as trade-marks.

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In the *Shaver case, supra,* the plaintiff had for years made and sold bluing under the trade names "American Ball Blue" and "American Wash Blue." Defendant had for a time sold the plaintiff's goods, but later procured others to manufacture bluing for it which it sold as "American Ball Blue" and "American Wash Blue." The trial court enjoined the defendant from applying the names of plaintiff's articles to the products of other manufacturers. The court of appeals affirmed the decree, pointing out that the injunction did not prevent the company from stating that their product was of American manufacture, or was an American product.

In *Trappey* v. *McIlhenny Co., supra,* the McIlhenny family had for some thirty years sold a pepper sauce labeled "Tabasco Pepper Sauce," the word "Tabasco" being separated from the words "Pepper Sauce" and the condiment being termed "Tabasco." This sauce was made from peppers coming originally from Mexico called Tabasco peppers, but later grown by the McIlhennys in Louisiana. The name "Tabasco" as applied to peppers was geographical in that it was the name of the place or district in Mexico from which the peppers originally came. A rival concern began the sale of a sauce made from Tabasco peppers which they labeled "Tabasco." The Circuit Court of Appeals for the Fifth Circuit, through Judge King, held that the newcomer in the field should be enjoined from using the name "Tabasco" in the name of his prod-

uct, though he could, of course, use the word in stating that his product was made from Tabasco peppers. The exact limitations with respect to the use "Tabasco" placed on the defendant by the decree are shown by the following excerpt from the opinion:

> Upon the whole case, we think that the complainant was entitled to an injunction restraining the defendant from using the word "Tabasco" as the name, or as part of the name, of the sauce manufactured and sold by him. The injunction should go to the extent of preventing defendant from using the word "Tabasco" as the name or description of the sauce manufactured by him, but should not prevent his stating that the sauce is made from Tabasco peppers. (*Baglin* v. *Cusenier Co.*, 221 U. S. 580, 600, 31 Sup. Ct. 669, 55 L. Ed. 863.)
>
> The decree granting the injunction in this case is affirmed, so far as it enjoins the appellants from using the word "Tabasco" as the name of the sauce manufactured by them, or in any manner to designate or describe said sauce, or from using the word "Tabasco" otherwise than to state that the sauce manufactured by appellants is made from Tabasco peppers, said statement to be made in such manner as clearly to distinguish the sauce made by appellants from that manufactured by appellee (p. 28).

This Court denied a petition for certiorari in this case.

The Circuit Court of Appeals for the Third Circuit has held in a recent case, *Photoplay Publishing Co.* v. *LaVerne Publishing Co.* (269 Fed. 730), that though the title "Photoplay Magazine" is descriptive, yet when it has acquired a secondary meaning, a competitor will be enjoined from entitling a rival publication "Photo-Play Journal."

And in *British-American Tobacco Co., Ltd.* v. *British-American Cigar Stores Co.* (211 Fed. 933) the Circuit Court of Appeals for the Second Circuit held that the defendant should be enjoined from using the words "British American" in its corporate name, the terms having been so long used in the plaintiff's corporate name that the public would necessarily be deceived.

The decisions in *Wotherspoon* v. *Currie* (the *"Glenfield Starch Case,"* L. R. 5, H. L. 508), and *Thompson* v. *Montgomery* (the *"Stone Ale Case,"* 41 Ch. D. 35, 50) have been repeatedly approved by this court and are so familiar that they need only be referred to. They seem to us to hold that a trader will be enjoined from using the trade name of a competitor's product, though composed of geographical or descriptive terms, where it has come to mean the product of a competitor—not that he may use an identical name with an explanation. In the *Stone Ale case* the perpetual injunction granted *restrained the defendant from "carrying on the business of a brewer at Stone, under the title 'Stone Brewery' or 'Montgomery's Stone Brewery,'*

or under any other title so as to represent that the defendant's brewery is the brewery of the plaintiffs and from selling or causing to be sold any ale or beer not of the plaintiffs' manufacture, under the term 'Stone Ales,' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiffs' manufacture, and from infringing the plaintiffs' registered trade-marks, or any of them."

The injunction in the "*Glenfield Starch*" case restrained respondent, among other things, "*from using the word 'Glenfield' in or upon any labels affixed to packets of starch manufactured by or for him,* and from in any other way representing the starch manufactured by or for him to be 'Glenfield Starch,' and from selling or causing the same to be sold as 'Glenfield Starch,' and from doing any act or thing to induce the belief that starch manufactured by or for him, the respondent, is 'Glenfield Starch' or starch manufactured by the appellants."

In *Juvenile Shoe Co.* v. *Federal Trade Commission* (289 Fed. 57) the Circuit Court of Appeals for the Ninth Circuit held that where the Juvenile Shoe Corporation had built up a business in children's shoes under this name, a newcomer in the field would not be permitted to adopt the name Juvenile Shoe Company in the same business in the same territory.

Decisions of State courts dealing under general equity principles with the use of identical or similar corporate or trade names are in accord with the

opinions above summarized. (*Electric Supply Company* v. *Hess et ux.*, 245 Pac. 27; *Cleveland Opera Co.* v. *Cleveland Civic Opera Association*, 154 N. E. 352; *Computing Cheese Cutter Co.* v. *Dunn*, 88 N. E. 93; *Rodseth* v. *Northwestern Marble Works*, 152 N. W. 885.)

Descriptive or geographical terms used not as trade names of establishments or of goods but as advertising catch words, etc., are protected in that, if they have acquired a secondary meaning as denoting that the goods come from a particular manufacturer, their use by others will be so guarded as to prevent the passing off of their products as those of the original user of the terms. Instances of this sort are found in *Lowe Bros. Co.* v. *Toledo Varnish Co.* (168 Fed. 627); *Rubber & Celluloid Harness Trimming Co.* v. *F. W. Devoe* (233 Fed. 150); *Same* v. *Rubber Bound Brush Co.* (81 N. J. Eq. 419, affirmed 81 N. J. Eq. 519). It has also been held that the trade name of a commodity if descriptive may be used by competitors where the dress of the goods is such that passing off is highly improbable. This was the decision in *Richmond Remedies Co.* v. *Dr. Miles Medical Co., supra.* The case is readily distinguished from those relied on here and from the instant case because of the distinctive dress of the product; but even with this distinction it appears on principle opposed to the cases cited.

Some of the decisions seem to hold that an express intent to defraud must be proved or clearly infer-

able from the circumstances in order to justify an injunction restraining the use of the same or a similar trade name. If this be a condition precedent to such a decree, intentional deception appears here. (*Infra*, pp. 54–59.)

V

Respondent did not use the words "Shade Shop" descriptively, but as a trade name

The court in the instant case appears to have been of the opinion that the respondent used the words "Shade Shop" descriptively. The evidence, we believe, proves the contrary. As shown above, the business was listed in the telephone directory as "Shade Shop"; calls were received over the telephone and business thus transacted in that name. This is manifestly the use of the term as a trade name, not in a descriptive manner.

While the name "Shade Shop" was displayed in a conspicuous manner on two windows, there appeared immediately following it the words "WINDOW SHADES."

The use of these words was descriptive; and they were unnecessary if the name of the business in itself was descriptive. On the other hand, the words "Window Shades" sufficiently advised the public that window shades could be had within.

Furthermore, Sammons' business when he had been located in the same building had been designated as "The Shade Shop" and had become known by that name. Respondent's conduct was intended

to induce the public to believe that the business so known was being continued at the same place.

That the words "Shade Shop" were used as a trade name and not descriptively seems clear.

The courts distinguish between the use of words as a trade name and their use descriptively. Thus, where the plaintiff used the word "Rubberset" embossed on the ferrule of brushes and a competitor used the words "Set in Rubber" in the same place on its brushes, the court said:

> It follows, therefore, that the embossing by the defendant on the ferrule of its brushes of the words "Set in Rubber" is such as would inevitably lead to deception, as the evidence demonstrates that it has, and hence constitutes unfair competition. The words are thus used not descriptively, but as a trade name. (*Rubber & C. H. T. Co.* v. *F. W. Devoe et al.*, 233 Fed. 150, 158.)

So also, where the plaintiff used the word "Beaded" on the label of shoe laces, the label having a gold background with white lettering, and the defendant used the word "Nu-B-Ded" on a white label with gold lettering, the court said:

> The defendant never used the word descriptively, but always as a trade name. (*United Lace & Braid Mfg. Co.* v. *Barthels Mfg. Co.*, 221 Fed. 456, 462.)

And in *Trappey* v. *McIlhenny, supra,* the court enjoined the use of the word "Tabasco" as part of

a trade name but permitted the respondent to use it in a statement that its sauce was made from Tabasco peppers.

VI

Even if the trade name "The Shade Shop" in its primary signification is descriptive where a secondary meaning has attached, a subsequent user will be required to plainly distinguish his establishment

Admitting, arguendo, but not conceding that "The Shade Shop" is primarily descriptive of the place where window shades are sold, nevertheless where the name has come to mean a particular establishment a competitor who thereafter uses it, or a name practically identical with it, will be required clearly and unmistakably to distinguish his place of business from that of the original user of the name. This is so well settled as to hardly require the citation of authorities. The leading case on the point is *Elgin National Watch Co.* v. *Illinois Watch Case Co., supra,* where the geographical term "Elgin" (Elgin, Illinois) was in controversy. Mr. Chief Justice Fuller, who delivered the opinion of this Court, said:

> But it is contended that the name "Elgin" had acquired a secondary signification in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that where such a secondary signification has been acquired, its use in that sense will be protected by re-

> straining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached.
>
> * * * * *
>
> But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. (*Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537, 549; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Singer Man. Co.* v. *June Man. Co.*, 163 U. S. 169 (pp. 673–674).)

After summarizing *Singer Man. Company* v. *June Man. Company, supra, Reddaway* v. *Banham,* L. R. App. Cas. 1896, 199, and *Wotherspoon* v. *Currie, supra,* this Court said (p. 677):

> These and like cases do not sustain the proposition that words which in their primary signification give notice of a general fact, and may be used for that purpose by everyone, can lawfully be withdrawn from

> common use in that sense; but they illustrate the adequacy of the protection from imposition and fraud in respect of a secondary signification afforded by the courts.

In this connection, see also *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 435; and *G. & C. Merriam Co.* v. *Saalfield*, 198 Fed. 369, 373.

VII

The respondent did not distinguish his place of business and deception of the public followed

The court below was of the opinion that the appearance of the firm name "Hooper & Klesner" in inconspicuous type in display advertising and on his place of business sufficiently distinguished the business. The authorities on the point are directly contrary to the opinion in the case. In *Trappey et al.* v. *McIlhenny Co., supra,* Judge King refers with approval to 38 Cyc. 792, as follows:

> That one's name is added to the trade name is not a sufficient distinction to prevent the probable deception.

The court in that case held that the appearance of the junior company's name on the label on the bottle was not sufficient to advise the public that it was not the product that it was accustomed to buy as "Tabasco."

Rulling Case Law states:

> So it has been decided that one who has put up his wares in a distinctive package is entitled to an injunction against the use by

> a rival of a package indistinguishable in every particular, except the use of the rival's name at the bottom of the package in place of the complainant's. And protection has similarly been accorded to makers of candy and of bread. (26 R. C. L. 887.)

And in *Shaver* v. *Heller, supra,* the court held that the name and residence of the manufacturer on the package was not sufficient to distinguish articles coming from different manufacturers where the same name was applied to the articles.

In the instant case the distinction must be made in the clearest and most unmistakable manner wherever the name "Shade Shop" appears. This is because the goods sold, window shades, are not package goods whose dress or wrappings would serve to advise the purchaser of the source or origin of the goods. The fact that the establishment "Shade Shop" is not the same as the original store "The Shade Shop," must be made to appear on the establishment, in the listings in the telephone and street directories and in advertising. This was not done. Take the case of the sign "Hooper & Klesner" which appeared on respondent's place of business. As will clearly appear from an examination of Res. Ex. 1, R. 389, and Com. Ex. 31 and 32, R. 374–2 and 374–3, this sign was placed over the door at the *corner* of the building, while the sign "Shade Shop" appeared on both the Twelfth and H Street *sides* of the building. For this reason, alone, it would be entirely possible for a prospective purchaser to see

"Shade Shop" without seeing "Hooper & Klesner." Again, the sign "Hooper & Klesner," which appeared over the corner entrance, was not only higher than the "Shade Shop" signs appearing on the Twelfth and H Street sides of the building, but was of an entirely different style, the letters being larger, and raised, and the background being different. And the testimony of the witnesses is that they saw the sign "Shade Shop," but did not see the sign "Hooper & Klesner." (R. 10–15, 16–19, 19–22, 37–46, 47–49, 62–64, 67–69.) Reference has been made to the fact that respondents, after Sammons left them, for the first time caused their business to be listed in the telephone directory as "Shade Shop—Hooper & Klesner." *Infra,* p. 56.

But reference to Com. Ex. 12 and 13 (R. 369) shows that, even though "Hooper & Klesner" did follow "Shade Shop," nevertheless the listing was *above and before* that of Sammons, thus giving respondents a great advantage in this respect, because 60 per cent of Sammons' business was done over the telephone. (R. 205.) Most of the witnesses who testified as to deception (R. 10–15, 16–19, 19–22, 37–46, 47–49, 62–64, 67–69) consulted the telephone directory before endeavoring to find Sammons' establishment. And it must be remebered that, subsequent to respondents' first listings in the telephone directory, the firm name "Hooper & Klesner" was dropped, leaving simply "Shade Shop" (see Com. Ex. 11, R. 56–58, 369), and that the respondents not only made no effort to have "Hooper

& Klesner" restored to its former position following "Shade Shop" (R. 58), but have not requested the telephone company to drop the misleading "Shade Shop," although such a request would have been readily acceded to, if made (R. 60).

Finally, and most important, the complete answer to the position taken by the Court below, namely, that the use of respondents firm name "Hooper & Klesner," in connection with "Shade Shop," was sufficient to prevent the possibility of fraud, is found in the proof that, despite the use of the firm name, which was not always used in juxtaposition with "Shade Shop," the evidence shows that the public has been deceived into believing respondents' establishment to be that of Sammons. (*Infra,* pp. 57–59.)

As has already been shown (*Infra,* R. 51–52), to a substantial portion of the purchasing public, the term "The Shade Shop" meant no one in a personal sense, but simply a place of business. The use of the former partnership name, "Hooper & Klesner," therefore, by the respondents, in connection with their establishment "Shade Shop," did not convey any *new* meaning to those formerly doing business with Sammons, who did not know his identity. For all they knew, it may have signified that the long-time proprietor of "The Shade Shop" had finally decided to disclose his identity. And, in their minds, this long-time proprietor may have been "Hooper & Klesner" and not Sammons. In

this connection, see the testimony of Mrs. Bowie (R. 18–19), Mr. Shelton (R. 40–41), Mrs. Lines (R. 48–49), and Mr. Appleby (R. 253, 258).

Much weight is placed by respondents upon the testimony of the witnesses Blundon (R. 269–271), Williamson (R. 275), and Marceron (R. 293, 297), who, as employees, testified that, in reply to telephone inquiries for "The Shade Shop" after Sammons' departure from Twelfth and H Streets, they informed such inquirers that they were talking to "Hooper & Klesner's shade shop." In view of what has just been said, this was not sufficient to differentiate respondents' business from that of Sammons.

VIII

The Commission has jurisdiction of cases of this class

In the closing paragraph of the opinion the court suggests want of jurisdiction in the Commission in this class of cases, since they involve, in the opinion of the court, controversies between private individuals cognizable in a court of equity and are not of interest to the public.

It is submitted that the Commission has jurisdiction in this and similar cases.

We have quoted above (supra, p. 12) from the decision in the *Gratz case* to the effect that unfair methods of competition cover methods characterized by fraud and deception, and have shown from decisions of this court that the basis of relief in equity in these cases is fraud. The decision of

this court in *Federal Trade Commission* v. *Winsted Hosiery Company* (258 U. S. 483) conclusively establishes that methods characterized by fraud are prohibited by the Act, though no element of restraint of trade or monopoly be present. This has been followed by the various circuit courts of appeals. (*Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744, 752, 753; *Procter & Gamble Company* v. *Federal Trade Commission,* 11 Fed. (2d) 47; *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307; *Guarantee Veterinary Company* v. *Federal Trade Commission,* 285 Fed. 853; *Juvenile Shoe Company* v. *Federal Trade Commission,* 289 Fed. 57; *Federal Trade Commission* v. *Balmé,* 23 F. (2d) 615; (C. C. A. — 2); *Winston Company* v. *Federal Trade Commission,* 3. F. (2d) 961; *Armstrong Cork Company* v. *Ringwalt Linoleum Works,* 235 Fed. 458.)

In further support of the Commission's jurisdiction in this class of cases we urge (1) that it has been expressly upheld by at least two United States Circuit Court of Appeals; (2) that the Congress intended to include such cases within the statute as shown by reports and debates attending the passage of the Act; (3) that this class of cases embraces every element found in the cases under the statute decided by the Supreme Court and other Federal courts; and (4) that the foundation of this class of cases at common law was protection of the public.

1. *In Juvenile Shoe Company* v. *Federal Trade Commission, supra,* and in *Federal Trade Commission* v. *Balmé, supra,* the Circuit Courts of Appeals for the Ninth and Second Circuits, respectively, affirmed orders of the Commission in this class of cases.

2. The Committee reports, statements of the chairmen of the committees reporting the bills and the debates show that Congress intended to declare unlawful all unfair methods of competition, and that some, best informed on the subject, were of opinion that this particular method would be included.

The report of the House Conference Committee contains this expression of the intention to reach all unfair methods of competition:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. * * * (Rec., 63d Cong., 2d sess., p. 14924; House Rep. No. 1142, p. 19.)

The Senate committee report said:

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable un-

> fair practices which prevail in commerce and to forbid their continuance, or whether it would, by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law, it would be quite possible to invent others * * *. It is believed that the term "unfair competition" has a legal significance which can be enforced by the Commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. (Senate Report No. 597, 63d Cong., 2d sess., p. 13.)

The report of the House Committee on Interstate and Foreign Commerce on the bill contains the following language:

> The administration idea, and the idea of business men generally, is for the preservation of proper competitive conditions in our great interstate commerce. (House Report No. 1553, 63d Cong., 2d sess., p. 2.)

Senator Cummins, after specifying "that competition which is designed to destroy competition or eliminate a competitor and to bring about monopoly," added: "Any vicious practice or method in competition that injuriously affects the public wel-

fare, even though not unlawful under the Sherman law" (ib. pp. 11236, 11456, 11529), and when asked to give an example cited a typical case of "passing off." The Senator said:

> The unfairness must be tinctured with unfairness to the public; not merely with unfairness to the rival or competitor. I put now to the Senator from Utah a question. I will give him a case, one of the last cases I tried when I was at the bar. A company was manufacturing soap, and it had taken the trade name of "White Laundry" soap; it had built up a business; and the people were in the habit of calling for this commodity by the name of "White Laundry." A rival sprang up and called its soap "Crystal White Laundry Soap," and it began to occupy the territory formerly held by the first producer, and was making its way pretty rapidly when the first producer filed a bill in equity, claiming that it was unfair competition, because the people who called for the particular article in the ordinary course of trade did not discriminate between the two; that when they called for "White Laundry" and were supplied with "Crystal White Laundry" soap, they did not detect the difference; and that, therefore, the competition was unfair. The meaning of the words "unfair competition" has been laid down in cases of that kind a hundred times. That is one class of cases to which this standard would apply.
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> * * * * *
>
> I do not say that is so in every instance, but that is the thought in all. We are not

simply trying to protect one man against another; we are trying to protect the people of the United States, and, of course, there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare. (Cong. Rec., 63d Cong., 2d sess., p. 11105.)

Senator Newlands, in charge of the Senate bill, said:

The Senator objects to the term "public morals" or "good morals" as a test. I think it is a very good test. I think there are certain practices that shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair.

I do not see much difficulty, when you appeal to the conscience of mankind, in determining what is fair and what is unfair in business practices. I think almost every well-regulated mind can determine it, particularly where you get together five men of capacity and learning and experience and present to them the facts regarding a certain business practice. I see no difficulty about such an organization determining what is fair and what is unfair, and determining it in such a way as to satisfy the universal judgment of mankind, except possibly the parties interested.

I claim, then, that that is a definite standard if the practice is against good morals and against public morals and tends to the

> injury of a competitor unfairly. Then, as to the numerous other things to which an action of tort or an action in equity to restrain can lie, it seems to me where those actions involve competition, where there would be a cause of action by the individual against his competitor, almost all those would be included in the term "unfair competition." (Cong. Rec., 63d Cong., 2d sess., p. 12980.)

Senator Robinson, after specifying the "passing off" of goods and Prof. Stevens's classification, added: "Oppression or advantage obtained by deception or questionable means and which 'normal business men' recognize as unfair" (ib. pp. 11107, 11126–11131), and "every practice which may be held by a court to be unjust, inequitable, or dishonest" (ib. p. 11593).

3. The essential elements of unfair competition at the common law are: (1) the simulation of trade name, dress of goods, or other device of the business; (2) calculated to deceive and defraud the public; and (3) consequent injury to the good-will of a competitor. The basis of the action is misrepresentation by words, symbols, dress of goods, or otherwise. In the *Winsted case* and other cases cited involving false branding, the elements of the offense were: (1) misrepresentation of a commodity; (2) deception of the purchasing public; and (3) injury to the competitior. The cases therefore involve the same elements. It is a circle in which in one case the individual competitor's injury is the

point of entrance or beginning, and in the other, the deception of the public which is done to the injury of one or more competitiors of the wrongdoer. In cases involving misbranding or false advertising, more competitors are injured than in the usual case of unfair competition, but the injury is less direct. The element which is important under the statute, deception of or fraud upon the public, is the same in these cases and in the case of common law unfair competition.

4. It is a mistake to assume that at common law injury to the private right of a competitor was the primary ground of relief from unfair competition, particularly of injunctive relief. On the contrary, some of the courts expressly declare that the public interest is paramount and that relief in private litigation is given primarily to protect the public from probable confusion, deception, and fraud. (*Rosenberg Bros. & Co.* v. *Elliott,* 7 Fed. (2d) 962, 965; *Dodge Bros.* v. *East,* 8 Fed. (2d) 872, 875; *Fischer* v. *Blank,* 33 N. E. 1040, 1041; *Draper* v. *Skerrett,* 116 Fed. 206, 209; *Collins Co.* v. *Paist Co.,* 14 Fed. (2d) 614, 615; *Vick Medicine Co.* v. *Vick Chemical Co.,* 11 Fed. (2d) 33, 35; *Luxor Cab Corp.* v. *Leading Cab Company,* 211 N. Y. Supp. 886; *Ajax Tool Company* v. *Buchalter,* 211 N. Y. Supp. 241; *Royal Baking Powder Company* v. *Royal,* 122 Fed. 337; *Federal Trade Commission* v. *Balmé,* 23 Fed. (2d) 615; *Yale, etc.,* v. *Robertson,* 21 Fed. (2d) 467.)

In *Collins Co.* v. *Paist Co., supra,* the court said:

> The law has a three-fold object in unfair competition cases: First, to protect the honest trader in business which fairly belongs to him; second, to punish the dishonest trader, who is taking his competitor's business away by unfair means; and third, to protect the public from deception.

In a case under the Federal Trade Commission Act, such as the one at bar, the object of the proceeding is directly to protect the public from deception and fraud instead of leaving the public interest to the fortunes of private litigation. Incidentally, the honest trader is protected.

IX

Whether a proceeding by the Commission would be to the interest of the public is an administrative question for determination by the Commission

The use by the court of the phrase "of interest to the public" indicates that it is in doubt whether a "public interest" within the meaning of the statute inheres in this class of cases. If so, we submit that the question whether a proceeding by the Commission would be to the interest of the public is an administrative one to be determined by the Commission before the institution of the proceeding and is not thereafter a subject of controversy either before the Commission or in the courts.

Section 5 of the Trade Commission Act provides—

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, *and if it shall appear to the Commission* that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint * * *. (Italics supplied.)

After prescribing the procedure to be followed after the issuance of a complaint, the statute provides, "if upon such hearing the Commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing" and shall issue its order, etc.

It is submitted that the words "if it shall appear to the Commission that a proceeding * * * would be to the interest of the public" confer absolute discretion upon the Commission to determine whether a proceeding shall be instituted, and that this is the only purpose of the provision. If the Commission so determines, it proceeds in the manner prescribed by the statute. If it determines not to proceed, it can not be compelled to do so by mandamus or by other process of the courts, even though it be admitted that the method of competition complained of is unfair. If it proceed, then the only question to be determined by the Commission or by

the courts at the conclusion of the case is whether the method of competition "is prohibited by this act." No question of public interest is involved in the issuance of an *order to cease and desist* from the use of the method, but only the question whether it is unfair within the meaning of the statute. If the method is unfair, then the order, it is submitted, can not be set aside because of the absence, in the opinion of the court, of a public interest in instituting the proceeding. (*People* v. *Ballard,* 134 N. Y. 269; 32 N. E. 54, 58, 59; *Hills Bros.* v. *Federal Trade Commission,* 9 Fed. (2d) 481, 483; *Toledo Pipe Threading Machine Co.* v. *Federal Trade Commission,* 11 Fed. (2d) 337, 342; *Moir* v. *Federal Trade Commission,* 12 Fed. (2d) 22, 28.

X

There is a sufficient public interest in this case

But if it be necessary affirmatively to show a public interest in this case it sufficiently appears. That interest lies in the protection of the public of the District of Columbia from fraud and deception in commerce. The Commission's finding with respect to the deception and fraud upon the public has been referred to. (*Supra,* p. 4–5.) The interest in such a case is not so widespread as in cases where companies do a national business. But in expressly applying the law to the District of Columbia, Congress acted in its constitutional capacity as a local legislature for the District. The business of each

of the companies involved, viewed as local business in window shades, is very substantial. The companies doubtless reach some thousands of persons in Washington; and the interest of the public of the District of Columbia in the subject matter is substantial.

Moreover, the mere number of the purchasing public affected by the use of an unfair method of competition is not controlling as to its illegality. The principle is the same whether many persons or few are deceived and defrauded. To make numbers the test of the validity of the order would require the endless taking of testimony to determine the number deceived in each case.

In one of the two cases thus far reaching the courts involving the legality under the statute of methods of this class the court has been of the opinion that public interest sufficiently appeared. (*Federal Trade Commission* v. *Balme, supra; Juvenile Shoe Corporation* v. *Federal Trade Commission, supra.*)

The practice is one which ought not be permitted to continue, as it is disruptive of business standards; and the protection of the public interest can not be left to the chance correctives provided in suits for the vindication of private wrongs.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be reversed, and the cause remanded, with

instructions to enter a decree affirming the Commissioner's order, and directing the respondent to comply therewith.

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APPENDIX A

SECTION 5 OF FEDERAL TRADE COMMISSION ACT

SECTION 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.

Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject

to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

APPENDIX B

STATEMENT OF THE EVIDENCE AND OF INFERENCES DRAWN THEREFROM

Sammons, the party complaining to the Commission, is an individual, and, as such, in 1901, entered into the business of manufacturing and selling window shades, exclusively (R. 23, 106–107), under the name and style of "The Shade Shop." This name is now, and has, at all times since its adoption in 1901, been the name of the business established and carried on by Sammons, and has always been used to single out and identify the business conducted by him. It is not used merely to denote that Sammons makes and sells window shades. Practically all the commercial activities of "The Shade Shop" were carried on under this name—under it, the business had become well and favorably known to a substantial portion of the purchasing public, most of whom were not aware that Sammons was personally identified with it.

Under this name, Sammons advertised his business extensively in the local newspapers, trade periodicals, and telephone directories, and by signs on his place of business; established bank accounts, purchased goods, made out bills, conducted correspondence, and receipted bills that had been paid. Under this name, also, telephone inquiries were made of him, written orders were sent to him for goods, supplies were shipped to him, bills and checks were made out to him, and business houses with whom he had dealings carried his accounts. (R. 5, 6, 10–12, 14, 15, 16–17, 19–20, 21, 23, 24, 25, 27, 31, 32–33, 34–35, 48, 49, 61–62, 65, 67, 71–72, 73, 75, 78–79, 85, 89–90, 93–94, 105, 107, 108, 109–115, 118, 121, 122, 123, 126–127, 128, 132, 133–135, 138, 139, 140, 144, 145–146, 147–148, 149, 151–152, 155–156, 161–163, 173, 175–176, 177, 182–184, 185, 188–189, 191, 196, 197, 203, 208, 209, 210, 212–213,

217, 221, 226–227, 237, 244, 246–247, 253, 254, 258, 274, 306, 308, 343–344, 346, 347, 366–370, 374(1), 375–378, 379–380, 381, 382, 383, 384–385, 386, 387, and 388.)

In this connection the following testimony of Sammons (R. 161–162) is significant:

> Q. During this 15 or 20 years, has there been anybody in the District of Columbia, to your knowledge, who has used the trade name "The Shade Shop" in selling or dealing in window shades in any manner?
>
> A. Never, except myself.
>
> * * * * *
>
> Q. During that time, to your knowledge, have you ever known of anyone, any place outside of Washington and the District of Columbia, or anywhere in the United States, dealing in or manufacturing window shades and trading under the name of "The Shade Shop"?
>
> A. I purchase material from every manufacturer of shade cloth and rollers in America. I have been in their offices and I have interviewed with managers and salesmen. *They have never known in their accounts or never received reply from any firm in the United States with the trade name "The Shade Shop."*
>
> Q. *Other than yours?*
>
> A. *Other than mine.* (Italics supplied.)

There is some evidence which shows that the identity of Sammons was known, his name being used in a number of cases in juxtaposition with "The Shade Shop," and in a few instances by itself. (R. 24, 27, 32, 34, 35, 37, 54, 56, 59, 66, 75, 78, 79, 81, 85, 96, 99, 105, 107, 108, 109, 111, 112–113, 120, 129, 135, 144–145, 146, 152, 153, 184, 198–199, 227, 237, 244, 249, 255, 326, 345, 366, 369–374, 382, 389, 390–392, and 431 (illus.).)

In the Spring of 1914 Sammons suggested to Hooper & Klesner, a partnership in the paperhanging, painting, and decorating business, the desirability of locating at the southeast corner of Twelfth and H Streets NW., and stated that if this firm would rent the premises he (Sammons) would sublease part of the space. They agreed. (R. 5, 132, 188, 305–306.) Sammons' sublease with the then partnership appears as Res. Ex. 6. (R. 390–392.) It will be noted that, in this lease, Sammons as party of the second part, is referred to as

W. Stokes Sammons, *trading as "The Shade Shop,"* and his signature is in the same style. The lease was not a partnership arrangement, and there can be no doubt but that the partnership knew at that time that Sammons was trading as "The Shade Shop." Respondent Hooper left the partnership in October, 1919, and the respondent Klesner continued the business under the old firm name. (R. 342.)

When "The Shade Shop" moved into the premises at Twelfth and H Streets NW., rented by the firm of Hooper & Klesner, Sammons had his trade name, "The Shade Shop," lettered upon two windows, one facing on the Twelfth Street side and the other on the H Street side (R. 5, 78, 89–90, 306), and conducted his business, independently, as before, under the name "The Shade Shop" (R. 306). The signs, by reason of their striking color scheme—white lettering against a green background—were readily discernible by passers-by. (R. 110, 132.) Hooper & Klesner occupied the front and Sammons the rear part of the store (R. 24, 25, 31, 77, 132–133, 189, 306), with a partition between. The partnership continued its business of paperhanging, painting, and decorating, and Sammons his business, "The Shade Shop," always as an independent concern, in the work of manufacturing and selling window shades.

Respondent Klesner testified that there was no competition in the store between Sammons and his firm. "We called him in in every instance, if he was there, to wait on the customers" (of "The Shade Shop"). (R. 362.) Klesner also stated emphatically that "there were not two firms operating in shades there." (R. 362; see also R. 190.) *Sammons' name did not appear anywhere on the windows or building.* (R. 25, 26, 189, 307.)

The business of "The Shade Shop" gradually increased, amounting, in the year 1915, the last year it was located at Twelfth and H Streets, to about $30,000 (R. 252); and rising rapidly in the new quarters at 733 Twelfth Street until it reached the sum of approximately $75,000 to $80,000 in the year 1920 (R. 204, 252). A few days prior to December 1, 1915, Sammons, for reasons not disclosed—with notice to and apparently without objection from Hooper & Klesner (R. 136, 194, 244–245, 251)—moved to four doors down the

street (733 Twelfth Street) from his then location with Hooper & Klesner (R. 193, 204, 307). This removal was made on a Sunday morning, in order to avoid interruption to business, and things were progressing peaceably until Sammons' assistant started to remove from the windows the signs "The Shade Shop," which Sammons had paid for. (R. 137.) At this point, Klesner objected very strenuously, and emphasized his objection by flourishing a revolver. Klesner was arrested and confined, Sammons returning to the premises at Twelfth and H Streets, where he completed the removal of his signs, and moved to his new place of business. (R. 24, 79–81, 93–97, 135–139, 310–311, Com. Ex. 30.)

INTENT TO DECEIVE

After Sammons had changed the location of "The Shade Shop," Klesner and his then partner, Hooper, who were not on good terms with Sammons (R. 215, 281–283, 312, 357), decided to engage at once (F. 29, 141, 343) in the business of manufacturing window shades, and to secure for themselves the trade of this nature which Sammons had developed. Their intention to appropriate to their own use the good will previously built up by Sammons appears from the testimony of Klesner himself (R. 313–314):

> Q. Now, when Mr. Sammons left Twelfth and H Streets, what did you do, so far as the business of window shades was concerned?
>
> A. Why, he had put us in a peculiar position. You remember, he approached us. Previous to him approaching us on Eleventh Street, we were dealing with S. Kann Sons Co., getting our shades there. When he broke his lease with us and moved out, we could not very well keep on dealing with him after that, and in the meantime, Kann Sons had given up their shade shop and we knew of no other place to get shades the way we had previously gotten them made, and *we got together and talked it over and decided to carry on the window-shade business the same as Sammons had done, using the rear part of the store to operate in*, and in that way help to contribute to the rent that he had refused to pay.
>
> Q. Did you consider that the rent, the whole of the $83.33, at that time a burden, or more than you felt you could pay?

A. Yes, indeed. It was far more than we could afford to pay out of our little bit of shade work we were then doing. We felt, *inasmuch as since the public had come there and begin to come there* and as we had tried to get shade work more than we had tried to get before, *and he, being there, naturally would cause other people to know there were shades to be had in that store, we thought we may as well continue and put an extra in there, and try to make it pay that way; as it appeared later on we did make that end of it pay.* (Italics supplied.)

This explanation, while seemingly quite naïve, when viewed in connection with the rest of the evidence, is decidedly unconvincing. In the first place, the partnership Hooper & Klesner, up to this time, had not engaged in the manufacture of window shades (R. 29, 78, 131, 135, 186, 192, 343); they were not listed under "Window Shades" in the commercial section of the telephone directory (R. 51); and there was nothing on their windows, billheads, or letterheads to indicate even that they took orders for window shades (R. 192, 245). It is true that they did take orders for window shades, which they turned over to Sammons; this was a common practice for concerns engaged in business such as theirs, and Sammons did the window-shade work of 90 per cent of the wall-paper men in Washington without his identity being disclosed. (R. 187, 190, 231, 253, 259, 260, 274, 286, 304–305, 306, 362.)

Without authority from Sammons (R. 143, 159), and in order to carry out their expressed purpose, respondents commenced the manufacture of window shades in the workshop formerly used by Sammons, and put as a sign upon their windows the words "Shade Shop," in letters of the same shape, size, and color, with the same background, and in the identical location where Sammons had had his sign "The Shade Shop," the net result being that the premises at Twelfth and H Streets, to all intents and purposes, had exactly the same appearance as when Sammons conducted his business there, the only difference being the removal of the word "The" from "The Shade Shop." (R. 33, 110, 141, 143, 307, 312, 395–396, Com. Ex. 31 and 32, R. 374–2, 374–3; Res. Ex. 1, opp. R. 389.)

They had billheads and letterheads prepared, upon which, according to the testimony of the witness Williamson, there

appeared, for the first time, the words "Shade Shop." (R. 281.) Klesner contradicts this, but also admits (R. 350) that Miss Williamson, as his stenographer, made out the bills, attended to the correspondence, and had charge of his billheads and letterheads.

Another step taken by the respondents was to cause their business—hitherto listed simply under the partnership name "Hooper & Klesner" (R. 51)—to be listed in the local telephone directory as "Shade Shop," with the sublisting of "Hooper & Klesner" following it. It will be recalled that Sammons moved his establishment, "The Shade Shop," from Twelfth and H Streets NW. to 733 Twelfth Street about December 1, 1915. On January 3, 1916, the respondents contracted with the Chesapeake & Potomac Telephone Company (R. 51–53, 59–60, 350) to list their places of business in the local telephone directory, both in the main alphabetical listing and in the classified business listing, as "Shade Shop, Hooper & Klesner." And these listings were inserted in said directories immediately *above* the listings of "The Shade Shop," Sammons' establishment, thus:

Com. Ex. 12, excerpt from p. 253 of the telephone directory of June 16, 1919, referred to on p. 55 of the record, and printed at R. 369:

Main 4763 Shade Shop, Hooper & Klesner-----SE. cor. 12th & H NW.
Main 4874 Shade Shop The, S. S. Sammons, window shds, 733 12th NW.

Com. Ex 13, excerpt from p. 261 of the telephone directory of April 15, 1920, referred to on p. 55 of the record, and printed at R. 369:

Main 4763 Shade Shop, Hooper & Klesner-----SE. cor. 12th & H NW.
Main 4874 Shade Shop The, S. S. Sammons, window shds, 733 12th NW.

While Com. Ex. 12 and 13 refer to the years 1919 and 1920, the listing in these latter years is the same as in the years immediately following the order of January 3, 1916. (R. 60.)

The telephone company, afterwards, in order to eliminate what was considered nonessential matter, dropped the words "Hooper & Klesner" from the previous listing of "Shade Shop, Hooper & Klesner" (R. 56–58), and, allowing for changes of address, the main listings, for both respondents and Sammons, have been:

Com. Ex. 11, excerpt from p. 175 of the telephone directory for the Fall of 1920, referred to on p. 50 of the record, and printed at R. 369.

Shade Shop, 741 12th NW---------- Main 4763
Shade Shop, 830 18th NW---------- Main 4874

Respondents, however, have made no effort to have the firm name "Hooper & Klesner" restored to its original position following "Shade Shop." (R. 58.) Furthermore, they have not requested the telephone company to drop the misleading listing of "Shade Shop," although such a request would have been readily acceded to, if made. (R. 60–61.) The tactics of respondents in thus simulating Sammons' trade name in connection with telephone advertising become of major importance in this case, when it is remembered that 60 per cent of Sammons' business was done over the telephone. (R. 205.)

If respondents had intended embarking in the window-shade business *in good faith*, why was it necessary for them to adopt the name "Shade Shop"—almost identical with "The Shade Shop" of Sammons'? Wouldn't the term "Window Shades" painted on the establishment have served the purpose?

In dismissing the Commission's petition, the Court below remarked (R. 455–456): "In the absence of any showing that defendant was attempting to dispose of his goods under the pretense that they were the goods of Sammons, there is no ground whatever in law or reason for invoking the doctrine of unfair competition"; and "The record is silent as to any attempt on the part of defendant or his employees to deceive or entice Sammons' customers into dealing with him." It is submitted that what has already been said is amply sufficient to support that part of the Commission's findings as to the facts (R. 414–416, par. 7), relative to intention on the part of respondents "to deceive or entice Sammons' customers" into dealing with them.

DECEPTION OF THE PUBLIC

The finding of the Commission with respect to this phase of the case appears on pages 415–416 of the record, and is amply supported.

Customers of "The Shade Shop" have been deceived by the name "Shade Shop," as used by respondents, into buying goods from the respondents instead of, as they intended, from Sammons. (R. 10–15, 16–19, 19–22, 37–46, 47–49, 62–64, 67–69.) None of these instances of confusion is denied by Klesner (R. 331), and he specifically mentions Mr. and Mrs. Bowie, Shelton, Etchinson, Goff, Mrs. Lines, and Wills (R. 331). In spite of the testimony as to respondents' instructions to their sales force, persons desiring to purchase window shades from Sammons' "The Shade Shop," who called at respondents' "Shade Shop," due to the confusion in the names, were *not* advised that Sammons had moved to another location; they were simply told he was "out." (R. 38–39, 67, 69.)

The absence of the word "The" before the name "Shade Shop," the name of the respondents' establishment, gives opportunity for quibbling, mistakes and deception. (R. 19–22, 67.) Customers do not distinguish between the names "*The* Shade Shop" and "Shade Shop." The absence or presence of the word "The" is without significance to them. (R. 18, 20–22, 25, 27, 30–33.)

Sammons testified as to complaints "*once or twice a week*" *for five years* (R. 159–160); also to "many complaints * * * on the telephone" (R. 172).

As already mentioned, *confusion in regard to telephone calls is of peculiar importance in connection with this case, as 60 per cent of Sammons' business is done over the telephone.* Thus, Sammons testified (R. 205), "about 60 per cent of my business is done over the telephone, *and it is the telephone that is the most misleading thing in my business.*"

Another excerpt from Sammons' testimony is interesting in this connection (R. 213):

> Q. Now, Mr. Sammons, at the time while you were on Twelfth Street, 733, did you have any difficulty with the mail service there by reason of the fact that Hooper & Klesner also had on their windows the words "Shade Shop"?
>
> A. I went to the Post Office Department and had a personal interview with the Third Assistant Postmaster General. I put my case up to him, and he favored me, and he said that I was right, and gave

instructions that all mail addressed as "The Shade Shop," or "Shade Shop," should go to 733 Twelfth Street. That was his orders.

Again (R. 243), referring to telephone complaints, he said: "I had several complaints from people calling up that they had been confused in the words 'Shade Shop,' as the telephone book had 'Shade Shop, Twelfth and H Street'—and 'Shade Shop,' either Twelfth or on H Street—what the address was I do not know." When asked about the frequency of these complaints, he answered: "Well, in a period of about four months, at least a dozen."

The witness Blundon, an employee of respondents (R. 262), said: "Those were persons that we *repeatedly* answered over the phone and they did inquire for *The* Shade Shop." The same witness testified that he heard the witness Williamson, respondents' stenographer, *frequently* respond to telephone calls. "As a rule, if anyone called up and says, 'Is this the shade shop,' she always says, 'Shade Shop.'" (R. 265.) The witness Williamson, afterward (R. 275) testified that her reply was "Hooper & Klesner's shade shop."

The witness Williamson testified as to instances of confusion in the mail (R. 277), and, when asked by counsel for respondents as to her conversations with Sammons after the latter had left Twelfth and H Streets, said (R. 285):

> A. He would always come up with me by saying that I had gotten one of his orders.
> Q. What else would he say?
> A. That is all he discussed; I had taken one of his orders; something to that effect.

So also Marceron, respondents' shade cutter: "*I always had been instructed to give the name to a party over the phone as "Shade Shop"* (meaning respondents' place of business). (R. 287.) See also R. 293, 297.

The respondent Klesner himself testified to telephone confusion (R. 315 et seq.), and to confusion in the mail (R. 216).

The facts found were based upon evidence taken (R. 9–404) on the issues raised by the Commission's complaint (R. 1–4) and respondents' answer (R. 4–7), and were embodied by the Commission in its report upon the facts (R. 411–416).

○